

ESTTA Tracking number: **ESTTA35901**

Filing date: **06/16/2005**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	RealAge, Inc.
Granted to Date of previous extension	07/06/2005
Address	10675 Sorrento Valley Road San Diego, CA 92121 UNITED STATES

Attorney information	Shauna M. Wertheim, Esq. Roberts Abokhair & Mardula, LLC 11800 Sunrise Valley Drive Reston, VA 20191 UNITED STATES swertheim@globe-ip.com, jabokhair@globe-ip.com, jmardula@globe-ip.com, kunger@globe-ip.com, amcgarvey@globe-ip.com Phone:(703) 391-2900
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Applicant Information

Application No	78399381	Publication date	03/08/2005
Opposition Filing Date	06/16/2005	Opposition Period Ends	07/06/2005
Applicant	Health First Corporation		

	9600 San Mateo Blvd. NE Albuquerque, NM 87113 UNITED STATES
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Goods/Services Affected by Opposition

Class 009. First Use: 20030901First Use In Commerce: 20030901 All goods and services in the class are opposed, namely: Computer software in the field of determining a user's level of fitness; and computer software in the field of providing a training program to improve a user's level of fitness
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Attachments	Ntc of Opposition.pdf (6 pages) Ex 1.Cert of Registration.318.pdf (1 page) Ex 2. Cert of Registration.846.pdf (1 page) Ex 3. Cert of Registration.113.pdf (1 page) Ex 4. Cert of Registration.201.pdf (1 page) Ex 5.Cert of Registration.425.pdf (1 page) Ex 6.Cert of Registration.games.939.pdf (1 page)
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Signature	/Shauna M. Wertheim/
Name	Shauna M. Wertheim, Esq.
Date	06/16/2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of HealthFirst Corporation

U.S. Serial No. 78/399,381

Filed: April 9, 2004

Mark: BODYAGE

Published in the Trademark Official Gazette
on March 8, 2005

RealAge, Inc.,

Opposer,

Opposition No.

HealthFirst Corporation,

Applicant.

NOTICE OF OPPOSITION

Box: Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

Dear Commissioner:

Opposer, RealAge, Inc. (hereinafter "RealAge"), a Delaware corporation, having its principal place of business at 10675 Sorrento Valley Road, San Diego, California 92121, believes that it will be damaged by registration of the mark of Application Serial No. 78/399,381, and hereby opposes same.

As grounds of opposition, it is alleged that:

1. Registration of the mark BODYAGE, U.S. Serial No. 78/399,381, should be refused under 15 U.S.C. § 1052(d) because the mark so resembles marks of RealAge registered in the United States Patent and Trademark Office and previously used by RealAge in the United States, as to be likely to cause confusion, mistake, or deception when used on, or in connection with, the goods or services of Applicant.
2. On information and belief, HealthFirst Corporation (hereinafter "Applicant") filed trademark Application Serial No. 78/399,381 for "Computer software in the field of determining a user's level of fitness; and computer software in the field of providing a training program to improve a user's level of fitness," in International Class 9, on April 9, 2004. The application was published for opposition on March 8, 2005 in the Official Gazette of the United States Patent and Trademark Office.
3. RealAge obtained an extension of time in which to oppose through July 6, 2005, pursuant to requests filed with the Trademark Trial and Appeal Board on March 8, 2005 and May 6, 2005.
4. There is no issue as to priority. Applicant filed the subject application based upon an alleged first use of the mark BODYAGE in United States commerce as of September 1, 2003. RealAge's dates of first use for its registered marks listed below all pre-date Applicant's alleged date of first use.
5. RealAge is the owner of the following REALAGE marks:

<u>Mark</u>	<u>Identification of Goods/Services</u>	<u>Registration No.</u>
REAL AGE	Computer software for determining physiological age based upon a patient's medical history and lifestyle factors, in Class 9.	2,261,318

REALAGE	Computer software for determining physiological age based upon a patient's medical history and lifestyle factors, in Class 9.	2,155,113
REALAGE	Vitamin and mineral supplements, in Class 5	2,239,846
REALAGE	Counseling in the field of health maintenance, namely, assessing physiological impact of dietary and lifestyle choices, in Class 42.	2,305,201
REALAGE	Publications, namely, a series of books on health, fitness, diet, exercise and lifestyle, in Class 16.	2,916,425
REALAGE	Computer game programs, and video game cartridges and software for playing video games, in Class 9.	2,913,939

6. Since at least September 22, 1997, long before Applicant's first alleged use, RealAge has used its REALAGE® and REAL AGE® marks consistently. RealAge has used its marks in connection with, among other things, its test for assessing physiological impact of dietary and lifestyle choices on a person's health. RealAge has expended considerable time and resources in its promotion of the products and services it provides under the REALAGE® and REAL AGE® marks. Since the first use of its mark in 1997, RealAge has reached over 15 million consumers worldwide through its REALAGE® test and its REALAGE® books, including *YOU: The Owner's Manual*, *The RealAge Makeover*, *Cooking the RealAge Way*, *The RealAge Diet*, and *RealAge: Are You as Young as You Can Be?* Through these and related efforts, it has built a substantial reputation and level of good will in the relevant communities for its marks. As a

company, RealAge has worked with the top pharmaceutical companies and their providers of health marketing services for the general population.

7. In addition to a number of products and services it distributes under the REALAGE® and REAL AGE® marks on a global basis, both directly and through licensing, RealAge's website at www.realage.com is accessible worldwide to consumers. At this website, the consumer takes the RealAge® Test "for personalized health information." The test comprises a series of questions to arrive at the individual's physiological age based upon that individual's diet, lifestyle, and hereditary factors. As a result of the uses set forth herein, the purchasing public has come to associate the REALAGE® and REAL AGE® marks with RealAge as the source of origin of RealAge's products and services.

8. On information and belief, the goods and services offered in association with HealthFirst's BODYAGE mark are similar to those offered by RealAge, and are provided to the same or closely related consumers and businesses. The BODYAGE mark is advertised, promoted and used in commerce as the "Polar BodyAge™ Quiz" and "Polar BodyAge System." Promotional materials containing the mark ask the consumer "What's Your Body Age?" and "Calculate Your Body's True Age." The 6-part test is designed to determine the consumer's "body age" based on a variety of factors – fitness, lifestyle, nutrition and family history. The test and system are promoted in print ads, brochures, and websites at www.polarusa.com and www.loweryourbodyage.com, and associated with Equinox Fitness Clubs.

9. Use by Applicant of the BODYAGE designation for assessing physiological

impact of dietary and lifestyle choices on a person's health closely resembles RealAge's trade name and marks, creates confusion and mistake, and has the effect of deceiving persons into the erroneous belief that Applicant's services are authorized, endorsed, and/or sponsored by RealAge, or are connected in some way with RealAge.

10. RealAge has continuously, extensively, and progressively used the REALAGE® and REAL AGE® marks, and has and continues to expand its markets, number of marketed products, distribution channels, and sources represented by the REALAGE® and REAL AGE® marks. As a result, RealAge's customers and potential customers, as well as others, have come to know and recognize RealAge's REALAGE® and REAL AGE® marks and associate same with RealAge and/or the goods and services provided by RealAge. RealAge has built extensive goodwill in connection with the development, marketing, distribution, and sale of its products and services. RealAge's and Applicant's products and/or services, venues, and services for sales, distribution, and advertising of products and services are sufficiently related and commonly used or purchased by the same potential customers such that the public would assume that the products and services come from the same source.

11. RealAge has no control over the nature and quality of Applicant's goods and services which are and will be distributed and sold by Applicant under the mark it seeks to register, and consumers' possible dissatisfaction with Applicant's goods and services would damage RealAge's goodwill and reputation.

12. If registration of the mark sought here to be registered by Applicant is granted

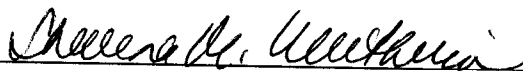
to Applicant, the effect would be to create for Applicant statutory rights under the Trademark Act that restrict, interfere with, and damage RealAge in the unhampered conduct of RealAge's business.

RealAge hereby gives notice under Rule 2.122(d), (37 C.F.R. § 2.122(d)), Trademark Rules of Practice, that, after hearing and in any appeal on this opposition proceeding, it will rely on its registration, and rights thereto, annexed as Exhibits 1 through 6 to this Notice of Opposition as evidence in support of this Notice of Opposition.

WHEREFORE, RealAge believes and avers that it will be damaged by registration of the above asserted mark of HealthFirst Corporation, and respectfully requests that no registration issue on Application Serial No. 78/399,381. RealAge prays that this opposition be sustained, that the application for registration hereby opposed be denied, and for such other and further relief that may be deemed proper.

Respectfully submitted,

REALAGE, INC.

By: 
John K. Abokhair
John F. Mardula
Shauna M. Wertheim
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Reston, Virginia 20191
(703) 391-2900
Attorneys for Opposer

Dated: June 16, 2005

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36, and 38

Reg. No. 2,261,318

United States Patent and Trademark Office

Registered July 13, 1999

**TRADEMARK
PRINCIPAL REGISTER**

REAL AGE

REAL AGE, INC. (DELAWARE CORPORATION)
6498 WEATHERS PLACE, #100
SAN DIEGO, CA 92121 BY CHANGE OF NAME
MEDICAL INFORMATICS CORPORATION,
THE (DELAWARE CORPORATION) SAN
DIEGO, CA 92121

FOR: COMPUTER SOFTWARE FOR DETER-
MINING PHYSIOLOGICAL AGE BASED UPON
A PATIENT'S MEDICAL HISTORY AND LIFE-

STYLE FACTORS, IN CLASS 9 (U.S. CLS. 21, 23,
26, 36 AND 38).

FIRST USE 9-22-1997; IN COMMERCE
9-22-1997.

NO CLAIM IS MADE TO THE EXCLUSIVE
RIGHT TO USE "AGE", APART FROM THE
MARK AS SHOWN.

SN 75-119,958, FILED 6-17-1996.

ALEXANDER L. POWERS, EXAMINING AT-
TORNEY

Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51, and 52

Reg. No. 2,239,846

United States Patent and Trademark Office

Registered Apr. 13, 1999

**TRADEMARK
PRINCIPAL REGISTER**

REALAGE

REAL AGE, INC. (DELAWARE CORPORATION)
6498 WEATHERS PLACE, #100
SAN DIEGO, CA 92121

FIRST USE 6-3-1998; IN COMMERCE
6-3-1998.

SN 75-978,089, FILED 4-24-1997.

FOR: VITAMIN AND MINERAL SUPPLEMENTS, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

LEIGH CAROLINE CASE, EXAMINING ATTORNEY

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36, and 38

Reg. No. 2,155,113

United States Patent and Trademark Office

Registered May 5, 1998

**TRADEMARK
PRINCIPAL REGISTER**

REALAGE

MEDICAL INFORMATICS CORPORATION,
THE (DELAWARE CORPORATION)
6498 WEATHERS PLACE, #100
SAN DIEGO, CA 92121

STYLE FACTORS, IN CLASS 9 (U.S. CLS. 21, 23,
26, 36 AND 38).

FIRST USE 9-22-1997; IN COMMERCE
9-22-1997.

SN 74-616,702, FILED 12-30-1994.

FOR: COMPUTER SOFTWARE FOR DETER-
MINING PHYSIOLOGICAL AGE BASED UPON
A PATIENT'S MEDICAL HISTORY AND LIFE-

ELIZABETH A. DUNN, EXAMINING ATTOR-
NEY

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

Reg. No. 2,305,201

United States Patent and Trademark Office

Registered Jan. 4, 2000

**SERVICE MARK
PRINCIPAL REGISTER**

REALAGE

REAL AGE, INC. (DELAWARE CORPORATION)
6498 WEATHERS PLACE #100
SAN DIEGO, CA 92121 , BY ASSIGNMENT
MEDICAL INFORMATICS CORPORATION,
THE (DELAWARE CORPORATION) SAN
DIEGO, CA 92121

FOR: COUNSELING IN THE FIELD OF
HEALTH MAINTENANCE, NAMELY, ASSESS-

ING PHYSIOLOGICAL IMPACT OF DIETARY
AND LIFESTYLE CHOICES, IN CLASS 42 (U.S.
CLS. 100 AND 101).

FIRST USE 9-22-1997; IN COMMERCE
9-22-1997.

OWNER OF U.S. REG. NO. 2,155,113.

SER. NO. 75-385,246, FILED 11-5-1997.

MARY CRAWFORD, EXAMINING ATTORNEY

Int. Cl.: 16

Prior U.S. Cls.: 2, 5, 22, 23, 29, 37, 38 and 50

United States Patent and Trademark Office

Reg. No. 2,916,425

Registered Jan. 4, 2005

**TRADEMARK
PRINCIPAL REGISTER**

REALAGE

REALAGE, INC. (DELAWARE CORPORATION)
10675 SORRENTO VALLEY ROAD
SAN DIEGO, CA 92121

THE MARK CONSISTS OF STANDARD CHAR-
ACTERS WITHOUT CLAIM TO ANY PARTICULAR
FONT, STYLE, SIZE, OR COLOR.

FOR: PUBLICATIONS, NAMELY, A SERIES OF
BOOKS ON HEALTH, FITNESS, DIET, EXERCISE
AND LIFESTYLE, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23,
29, 37, 38 AND 50).

OWNER OF U.S. REG. NOS. 2,239,846 AND
2,305,201.

SER. NO. 78-342,798, FILED 12-18-2003.

FIRST USE 4-30-1999; IN COMMERCE 4-30-1999.

AMY HELLA, EXAMINING ATTORNEY

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36, and 38

United States Patent and Trademark Office

Reg. No. 2,913,939

Registered Dec. 21, 2004

**TRADEMARK
PRINCIPAL REGISTER**

REALAGE

REALAGE, INC. (DELAWARE CORPORATION)
10675 SORRENTO VALLEY ROAD
SAN DIEGO, CA 92121

FIRST USE 8-31-2003; IN COMMERCE 8-31-2003.

FOR: COMPUTER GAME PROGRAMS, AND
SOFTWARE FOR PLAYING VIDEO GAMES, IN
CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

SN 78-283,918, FILED 8-6-2003.

GEORGE LORENZO, EXAMINING ATTORNEY